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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

MONA CRISTENE ACCETTA,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

Case No. 15-cv-01419-NJV

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Re: Dkt. Nos. 10, 19

INTRODUCTION

Plaintiff, Mona Cristene Accetta, seeks judicial review of an administrative law judge (“ALJ”) decision denying her application for disability insurance benefits and supplemental security income payments under Titles II and XVI of the Social Security Act. Plaintiff’s request for review of the ALJ’s unfavorable decision was denied by the Appeals Council. The decision thus is the “final decision” of the Commissioner of Social Security, which this court may review. *See* 42 U.S.C. §§ 405(g), 1383(c)(3). Both parties have consented to the jurisdiction of a magistrate judge. (Docs. 5 & 7). The court therefore may decide the parties’ cross-motions for summary judgment. For the reasons stated below, the court will grant Plaintiff’s motion for summary judgment, and will deny Defendant’s motion for summary judgment.

LEGAL STANDARDS

The Commissioner's findings "as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). A district court has a limited scope of review and can only set

1 aside a denial of benefits if it is not supported by substantial evidence or if it is based on legal
2 error. *Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Substantial
3 evidence is “more than a mere scintilla but less than a preponderance; it is such relevant evidence
4 as a reasonable mind might accept as adequate to support a conclusion.” *Sandgathe v. Chater*, 108
5 F.3d 978, 979 (9th Cir. 1997). “In determining whether the Commissioner’s findings are
6 supported by substantial evidence,” a district court must review the administrative record as a
7 whole, considering “both the evidence that supports and the evidence that detracts from the
8 Commissioner’s conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). The
9 Commissioner’s conclusion is upheld where evidence is susceptible to more than one rational
10 interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

12 SUMMARY OF RELEVANT EVIDENCE

13 *Nurse Fenton*

14 On February 13, 2009, Nurse Fenton, Plaintiff’s primary care person, diagnosed Plaintiff
15 with depression. AR. 404. Fenton prescribed Wellbutrin. *Id.*

16 In January of 2010, Plaintiff was again diagnosed with depression and anxiety, for which
17 Fenton prescribed Fluoxetine. AR. 400. The Fluoxetine prescription was refilled in June of 2010.
18 AR. 397. In November of 2010, Plaintiff was again diagnosed with depression (along with
19 headaches), for which Fenton increased Plaintiff’s Fluoxetine dosage. AR. 394. On follow-up
20 three weeks later, Plaintiff reported feeling “weird” on the increased Fluoxetine dosage. AR. 392.

21 In April of 2012, Plaintiff presented to Fenton with reports of severe agoraphobia, post-
22 traumatic stress disorder, and depression in addition to insulin-dependent diabetes. AR. 512.
23 Fenton continued Plaintiff on her current medications. AR. 512. In August of 2012, Fenton
24 questioned the diagnosis of post-traumatic stress disorder. AR. 467.

25 On September 6, 2012, Fenton completed a Mental Capacities Form on behalf of Plaintiff.
26 AR. 506. As to Plaintiff’s mental capacity, Fenton found that Plaintiff suffers from depression
27 and that, as a result, she has difficulty with maintaining and completing tasks; poor self-care; that

1 her anhedonia and fatigue render her unable to communicate well with others in that she is
2 irritable and apathetic at times; that she is unable to sustain focus and attention with poor
3 motivation; and that she has poor adaptation to stress. AR. 506.

4 On November 6, 2012, Nurse Fenton diagnosed Plaintiff with anxiety, insomnia, and
5 depression. AR. 502. On November 20, 2012, Plaintiff reported having panic attacks and that she
6 wakes up crying. AR. 501. Fenton discontinued the Cymbalta and started Plaintiff on Sertraline.
7 AR. 501.

8 ***Dr. Zipperle – State Agency Examining Psychologist***

9 On July 31, 2010, the state agency sent Ms. Accetta for examination and evaluation by
10 psychologist Marion-Isabel Zipperle (AR. 305-08). Dr. Zipperle's diagnostic impressions were of
11 polysubstance abuse/dependence in remission; major depressive disorder; post-traumatic stress
12 disorder; panic disorder with agoraphobia; and a personality disorder. AR. 307. Dr. Zipperle's
13 prognosis for Plaintiff was "poor" due to her "memory issues, her anxiety about leaving the house
14 and being in crowds, her fatigue, uncomfortableness [sic] leaving her home, nervousness, and self-
15 esteem issues, self-confidence issues, flashbacks, nightmares, intrusive thoughts, hypervigilance,
16 mistrustfulness of others, believing that they are out to hurt her." AR. 308. Dr. Zipperle opined
17 that Plaintiff would need special or additional instructions to work; that her psychiatric issues
18 make it impossible to maintain attendance in the workplace; that she could not complete a
19 workday or workweek without interruptions from her psychiatric issues; and that she could not
20 deal with the stress encountered in the workplace. AR. 308.

21 ***Dr. Kalman – State Agency Examining Psychiatrist***

22 On March 5, 2012, Plaintiff underwent psychiatric examination and evaluation by Dr. Les
23 Kalman, M.D., Psy.D.. AR. 423-27. Dr. Kalman reviewed the consultative examination report
24 from Dr. Zipperle in preparing for the evaluation. AR. 423. Dr. Kalman's diagnostic impressions
25 were of post-traumatic stress disorder, Major Depression, Panic Disorder with Agoraphobia, and
26 Amphetamine Abuse in remission. AR. 426. He opined that Plaintiff was unable to relate and
27 interact with supervisors and co-workers; unable to deal with the public; and that she has a
28 decreased ability to maintain attention, concentration, and memory; with a decreased ability to

1 withstand the stress and pressures of daily work activities. AR. 426.

2 **THE FIVE STEP SEQUENTIAL ANALYSIS FOR DETERMINING DISABILITY**

3 A person filing a claim for social security disability benefits (“the claimant”) must show
4 that she has the “inability to do any substantial gainful activity by reason of any medically
5 determinable physical or mental impairment” which has lasted or is expected to last for twelve or
6 more months. 20 C.F.R. §§ 416.920(a)(4)(ii), 416.909. The ALJ must consider all evidence in the
7 claimant’s case record to determine disability (*Id.* § 416.920(a)(3)), and must use a five-step
8 sequential evaluation to determine whether the claimant is disabled (*Id.* § 416.920). “[T]he ALJ
9 has a special duty to fully and fairly develop the record and to assure that the claimant’s interests
10 are considered.” *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983).

11 Here, the ALJ evaluated Plaintiff’s application for benefits under the required five-step
12 sequential evaluation. *See* AR. 22-37.

13 At Step One, the claimant bears the burden of showing She has not been engaged in
14 “substantial gainful activity” since the alleged date the claimant became disabled. 20 C.F.R. §
15 416.920(b). If the claimant has worked and the work is found to be substantial gainful activity,
16 the claimant will be found not disabled. *Id.* The ALJ found that Plaintiff had not engaged in
17 substantial gainful activity since her alleged onset date. AR. 24.

18 At Step Two, the claimant bears the burden of showing that she has a medically severe
19 impairment or combination of impairments. 20 C.F.R. § 416.920(a)(4)(ii), (c). “An impairment is
20 not severe if it is merely ‘a slight abnormality (or combination of slight abnormalities) that has no
21 more than a minimal effect on the ability to do basic work activities.’” *Webb v. Barnhart*, 433
22 F.3d 683, 686 (9th Cir. 2005) (quoting S.S.R. No. 96-3(p) (1996)). The ALJ found that Plaintiff
23 suffered the following severe impairments: insulin-dependent diabetes, hepatitis C,
24 hypothyroidism, beginning diabetic neuropathy of the feet, degenerative disc disease of the
25 cervical spine, major depressive disorder, panic disorder, and post-traumatic stress disorder. AR.
26 25.

27 At Step Three, the ALJ compares the claimant’s impairments to the impairments listed in
28 appendix 1 to subpart P of part 404. *See* 20 C.F.R. § 416.920(a)(4)(iii), (d). The claimant bears

1 the burden of showing her impairments meet or equal an impairment in the listing. *Id.* If the
2 claimant is successful, a disability is presumed and benefits are awarded. *Id.* If the claimant is
3 unsuccessful, the ALJ assesses the claimant's residual functional capacity ("RFC") and proceeds
4 to Step Four. *Id.* § 416.920(a)(4)(iv), (e). Here, the ALJ found that Plaintiff did not have an
5 impairment or combination of impairments that met or medically equaled one of the listed
6 impairments. AR. 25. Next, the ALJ determined that Plaintiff retained the RFC "to perform light
7 work" with several physical and mental limitations, including the restriction that she "should have
8 no interaction with the public." AR. 27.

9 At Step Four, the ALJ determined that Plaintiff was not capable of performing her past
10 relevant work. AR. 35. At Step Five, after considering the Plaintiff's age education, work
11 experience, and RFC, and after consulting with a VE, the ALJ determined that there were jobs that
12 exist in significant numbers in the national economy that Plaintiff can perform. *Id.* Accordingly,
13 the ALJ found that Plaintiff had "not been under a disability, as defined in the Social Security
14 Act," through the relevant time period. AR. 36.

15 ISSUES PRESENTED

16 Plaintiff presents two issues for this court's review of the ALJ's decision: (1) whether the
17 ALJ erred in rejecting the opinions of the state agency examining doctors and Fenton; and (2)
18 whether the ALJ erred in rejecting Plaintiff's complaints of mental limitations. Pl.'s Mot. Doc.
19 10-1 at 10 & 18.

20 DISCUSSION

21 *The ALJ's Rejection of the Medical Opinion Evidence*

22 Plaintiff argues that the ALJ improperly rejected the mental health opinions of the state
23 agency examining doctors and her treating source nurse Fenton. Defendant counters that the ALJ
24 properly rejected the medical opinion evidence.

25 With regard to Plaintiff's mental health limitations, the ALJ considered the opinions of
26 state agency examining doctors Zipperle and Kalman, treating source nurse Fenton, and non-
27 examining psychologists Patterson and Jacobson. Examining doctors Zipperle and Kalman both
28 opined that Plaintiff suffers work-preclusive mental limitations, while non-examining doctors

1 Patterson and Jacobson opined that Plaintiff was limited, but did not suffer work-preclusive
2 limitations. The crux of the ALJ's finding at issue here was that while Plaintiff would be
3 precluded from working with the general public, she could work in and among co-workers. Dr.
4 Zipperle opined that Plaintiff could not maintain work attendance based on her psychotic issues
5 and Dr. Kalman found that Plaintiff could not work with co-workers. The non-examining doctors
6 found that Plaintiff would be markedly limited in working with the public, but only moderately
7 limited in working with co-workers. The ALJ relied on the non-examining physicians to reject the
8 examining physicians' reports regarding working with co-workers, but then rejected the non-
9 examining doctors' opinions regarding plaintiff's ability to work with the public. The court finds
10 that the ALJ's determination lacks the support of substantial evidence.

11 "If a treating or examining doctor's opinion is contradicted by another doctor's opinion,
12 an ALJ may only reject it by providing specific and legitimate reasons that are supported by
13 substantial evidence." *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (quoting *Lester v.*
14 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995)). Dr. Zipperle found that Plaintiff's "psychiatric issues
15 make it impossible to maintain attendance in the workplace." AR. 308. The ALJ rejected this
16 opinion because "Dr. Zipperle reviewed no actual medical evidence in rendering her assessments"
17 . . . , primarily relied on Plaintiff's allegations rather than the examination findings, made
18 conclusions that were inconsistent with the examination, and because the opinion was inconsistent
19 with the record as a whole. AR. 33. Plaintiff argues that the ALJ's reasons are not supported by
20 substantial evidence.

21 Although Dr. Zipperle may not have reviewed medical records in formulating her opinion,
22 she did perform a "comprehensive psychiatric evaluation," including a mental status examination,
23 which included her own diagnostic impressions and observations. The Commissioner argues that
24 the ALJ properly rejected Plaintiff's subjective complaints, so therefore, Dr. Zipperle's opinion
25 based on those complaints were invalid. "However, "[a]n ALJ does not provide valid reasons for
26 rejecting an examining physician's opinion 'by questioning the credibility of the patient's
27 complaints where the doctor does not discredit those complaints and supports [her] ultimate
28 opinion with [her] own observations.'" *Dale v. Colvin*, No. C14-1936-BJR-BAT, 2015 WL

1 5254221, at *1 (W.D. Wash. Aug. 19, 2015) report and recommendation adopted, No. 2:14-CV-
2 01936-BJR, 2015 WL 5285774 (W.D. Wash. Sept. 9, 2015) (quoting *Ryan v. Comm'r, Soc. Sec. Admin.*, 528 F.3d 1194, 1199–1200 (9th Cir. 2008)). Here the ALJ rejected Plaintiff’s allegations
3 that she lacked the concentration necessary to perform unskilled work, AR. 29, and Dr. Zipperle
4 opined that Plaintiff could perform simple and repetitive tasks. AR. 308. Where Dr. Zipperle
5 found work-preclusive limitations it was based on her opinion that Plaintiff’s “psychiatric issues
6 make it impossible to maintain attendance in the workplace and she could not complete a workday
7 or work week without interruptions from her psychiatric issues. She could not deal with the stress
8 encountered in the workplace.” *Id.* The ALJ found Plaintiff’s complaints of anxiety and
9 depression to be credible. AR. 32. Thus, the ALJ failed to provide valid reasons for the rejection
10 of Dr. Zipperle’s opinion simply because it was based in part on Plaintiff’s complaints. In
11 addition, the ALJ did not address Dr. Zipperle’s opinion regarding Plaintiff’s attendance issues
12 related to psychiatric interruptions.

14 The Commissioner argues that the ALJ also properly rejected Dr. Zipperle’s opinion
15 because it was inconsistent with the examination findings, pointing the court to Dr. Zipperle’s
16 observations that Plaintiff exhibited good hygiene and grooming, cooperative behavior, a coherent
17 and logical thought process, full orientation and intact judgment. *See* AR. 33. However, those
18 observations are not inconsistent with the doctor’s findings regarding Plaintiff’s anxiety, findings
19 that the ALJ accepted. Even were these statements inconsistent, “the ALJ must not only identify
20 the conflicting information, but provide her interpretation thereof.” *Long v. Colvin*, No. 13-CV-
21 05716-SI, 2015 WL 971198, at *6 (N.D. Cal. Mar. 3, 2015).

22 Further, “[w]hile the ALJ stated that Dr. [Zipperle’s] opinion is inconsistent with the
23 record as a whole [], the ALJ failed to identify specifically what evidence in the record conflicted
24 with Dr. [Zipperle’s] opinion and failed to provide an interpretation of the conflicting evidence,
25 which is not enough to reject the opinion of an examining physician.” *Murillo v. Colvin*, No. 15-
26 CV-01325-JSC, 2016 WL 777793, at *14 (N.D. Cal. Feb. 29, 2016) (citing *Lester*, 81 F.3d at 830-
27 31). “Moreover, Dr. [Zipperle’s] opinion appears to have at least some support in the record,
28 inasmuch as it overlaps significantly with the opinion of the other examining physician, Dr.

1 [Kalman].” *Id.*¹

2 After a review of the medical evidence and a complete psychiatric evaluation, Dr. Kalman
3 opined that Plaintiff “would not be able to relate and interact with supervisors and co-workers.”
4 AR. 426. Dr. Kalman also opined that Plaintiff suffered a “decreased ability to maintain attention,
5 concentration and memory” and a “decreased ability to withstand the stress and pressures
6 associated with daily work activities.” *Id.* The ALJ rejected Dr. Kalman’s opinion because he did
7 not “provide reasons to support his determination” and his use of the “word [sic] ‘decreased
8 ability’ . . . without qualification diminishes the probative value of his opinion.” AR. 33. With
9 regard to the ALJ’s assertion that Dr. Kalman failed to provide reasons for his opinion, the court
10 finds this to be error. Dr. Kalman’s report provides the basis and reasoning for his findings,
11 including his review of medical records and his examination of Plaintiff. It is the nature of a
12 psychiatric report for the reasons for the opinion to be within the report. As to the ALJ’s dismissal
13 of the opinion because of the use of the undefined term “decreased ability,” that undefined term
14 only related to the ability to maintain attention, concentration, and memory and to withstand the
15 stress and pressures associated with daily work activities. It did not apply to Plaintiff’s ability to
16 relate and interact with supervisors and co-workers. Thus, the ALJ erred in that she failed to
17 provide any reason for the rejection of Dr. Kalman’s opinion that Plaintiff “would not be able to
18 relate and interact with supervisors and co-workers.”

19 As to Fenton’s opinion, the ALJ rejected it because it was inconsistent with the treatment
20 plan involving “infrequent” changes in medication, the treatment notes, and with the bulk of
21 medical evidence. As will be discussed below, the ALJ’s reasons which were based on
22 “infrequent” changes in medication are insufficient, as the ALJ failed to specify why four changes
23 in psychotropic medications in three years is “infrequent.” As to the inconsistency with the bulk
24 of medical evidence, as discussed above, the ALJ improperly rejected the medical expert opinion
25 in this case and thus, this basis fails as well.

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¹ It also coincides with nurse Fenton’s observations and at least in part with the opinions of the
28 non-examining psychologists, who both determined that Plaintiff is markedly limited in her ability
to interact with the public and moderately limited in her ability to get along and work with co-
workers. *See* AR. 95.

1 Moreover, the ALJ's decision reads in part as follows:

2 "On September 6, 2012, Ms. Fenton concluded that the claimant work experience
3 work-preclusion mental limitations (Exh. 13F/15), and Ms. Fenton issued a second
4 opinion on September 6, 2012, simply indicating that the claimant could not work
(Exh. 13F/12)."

5 AR. 33. The court is unable to parse this sentence's meaning and because the ALJ both adopted
6 and rejected several portions of Fenton's opinion overall, the court is unable to even guess as to
7 what portions of Fenton's opinion of Plaintiff's mental limitations the ALJ was specifically
8 rejecting here.

9 ***The ALJ's Credibility Determination***

10 In performing the two-step analysis in assessing the credibility of Plaintiff's subjective
11 testimony of her mental impairments, the ALJ determined that: at step one, Plaintiff's medically
12 determinable impairments could reasonably be expected to produce the symptoms alleged; and at
13 step two, Plaintiff's statements concerning the intensity, persistence, and limiting effects of the
14 symptoms are not credible. AR. 27. The ALJ made this determination by: (1) asserting that the
15 course of treatment Plaintiff received from Fenton did not substantiate allegations of disabling
16 symptoms, *id.*; and (2) by pointing to the psychological examiners' reports, AR. 28. Based on
17 these factors, the ALJ concluded that Plaintiff's "mental impairments and associated symptoms
18 are inconsistent with the balance of the medical record." AR. 29.

19 As to the psychological examiner's reports, the ALJ admitted Plaintiff's abnormal affect,
20 but pointed to her cooperative behavior, normal speech, good grooming, and no signs of psychosis
21 or suicidal ideation. *Id.* These reasons ignore the examiners' determinations that Plaintiff would
22 be precluded from interacting with the public and co-workers. Perhaps the ALJ omitted those
23 portions of the doctors' opinions because she later rejects them. In any event, as discussed above,
24 those rejections were improper and thus, as to the psychological examiners' reports, the ALJ has
25 not provided "convincing" reasons for rejecting Plaintiff's subjective complaints. *See Lingenfelter*
26 *v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) ("[T]he ALJ can reject the claimant's testimony
27 about the severity of [the claimant's] symptoms only by offering specific, clear and convincing
28 reasons for doing so.").

1 As to Plaintiff's course of treatment with Fenton, here the ALJ has failed to provide
2 specific, clear, or convincing reasons for rejecting Plaintiff's complaints. The ALJ merely makes
3 the statement that the course of treatment did not substantiate the allegations, then goes on to
4 describe the course of treatment. Plaintiff accurately summarizes her course of treatment with
5 Fenton as follows:

6 Starting in February of 2009, her first recorded psychiatric treatment, Plaintiff was
7 started on Wellbutrin (AR 404), which was changed to Fluoxetine in January of
8 2010 due to the development of anxiety (AR 400). The Fluoxetine was continued in
9 June of 2010 (AR 397) before the dosage was increased in November of 2010 (AR
10 394), but as of the end of that month, that increased dosage began causing side
11 effects (making her feel "weird") (AR 392). In April of 2012, nurse Fenton
12 continued the Cymbalta that she had already been taking (AR 502), but by
13 November of 2012, she reported panic attacks and that she was waking up crying,
14 so the Cymbalta was discontinued in favor of Sertraline (AR 501).

15 Pl.'s Mot. (Doc. 10-1) at 16. After describing the course of treatment, the ALJ points to Fenton's
16 decision "to continue to refill [Plaintiff's] psychotropic medications without change" from 2010
17 to 2012, without explaining why these two years of treatment with psychotropic medication itself
18 is insufficient to support Plaintiff's allegations of mental limitations. The ALJ recites four
19 changes of medication between February of 2009 and November of 2012 under Fenton but fails to
20 articulate why that course of treatment is "infrequent" or deficient to support Plaintiff's
21 allegations. Thus, the ALJ failed in her obligation to provide "specific, clear and convincing
22 reasons" in support of her adverse credibility determinations. *White v. Colvin*, No. C-14-5584
23 EMC, 2015 WL 4734915, at *8 (N.D. Cal. Aug. 10, 2015).

24 **CREDIT AS TRUE**

25 Having determined that the ALJ committed legal error, the court must consider whether to
26 remand the case back to the ALJ to correct the error, or to follow Plaintiff's request that this court
27 apply the "credit-as-true" rule and remand this case to the ALJ for the calculation of benefits. In
28 order to apply the credit-as-true rule,

29 "[t]he district court must first determine that the ALJ made a legal error, such as
30 failing to provide legally sufficient reasons for rejecting evidence. If the court finds
31 such an error, it must next review the record as a whole and determine whether it is
32 fully developed, is free from conflicts and ambiguities, and all essential factual
33 issues have been resolved. In conducting this review, the district court must
34 consider whether there are inconsistencies between [the claimant's] testimony and
35 the medical evidence in the record, or whether the government has pointed to

1 evidence in the record that the ALJ overlooked and explained how that evidence
2 casts into serious doubt the claimant's claim to be disabled. Unless the district
3 court concludes that further administrative proceedings would serve no useful
4 purpose, it may not remand with a direction to provide benefits."

5 *Dominguez v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2015), as amended (Feb. 5, 2016) (internal
6 citations omitted). Here the record contains ambiguities, in that the ALJ failed to provide specific,
7 clear and convincing reasons for rejecting Plaintiff's allegations and the ALJ failed to articulate
8 proper reasons for rejecting the medical opinion evidence. In addition, there are inconsistencies in
9 the medical record of evidence, between both the examining physicians and the non-examining
10 physicians. Accordingly, the court cannot apply the "credit-as-true" rule. *See Id.* at 409-410.

CONCLUSION

11 For the reasons stated above, the court GRANTS Plaintiff's motion for summary
12 judgment, and DENIES Defendant's motion for summary judgment. The court hereby
13 REMANDS this matter for further proceedings in accordance with this Order.

14 A separate judgment will issue.

IT IS SO ORDERED.

15 Dated: May 11, 2016



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17 NANDOR J. VADAS
18 United States Magistrate Judge
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